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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE SWAN AND FINCH COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 258.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
Assistant Attorney-General.

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STATEMENT.

The claimant made application under the drawback provisions of the customs act of August 28, 1894 (28 Stat. L., 551), for refunding of duties paid by it upon imported materials which it had used in the manufacture of lubricating oil, which oil was afterwards sold by it at the port of New York to vessels engaged in foreign trade for use on board upon their voyages in such trade. The claim was disallowed by the Treasury Department on the ground that the oil upon which the drawback was claimed was not an exportation—had not been exported—within the

meaning of the drawback section under which the claim was made. Thereupon suit was brought upon the claim in the Court of Claims, where the ruling of the Treasury Department was sustained. From the judgment of the Court of Claims dismissing its petition the claimant has appealed to this court, alleging error of the Court of Claims in not holding that the oil sold by it to a vessel in the foreign trade to be consumed on such vessel in the course of its voyage was an exportation and embraced in the provisions of the drawback law.

ARGUMENT.

It will be seen from the foregoing statement that there is but a single question to be determined on this appeal. That question is, comprehensively, Are ships' stores sold to vessels engaged in the foreign trade *exportations* in the sense that the word is used in the drawback provision of our tariff laws? Obviously this question can only arise because of the fact that the word "exportation" has a broad, general meaning, and also a restricted and technical meaning; so that the inquiry must be, in which sense was the word employed when used in the statute under consideration.

At the outset of the inquiry we find guidance in the following rule of interpretation:

> The first and most elementary rule of construction is that it is to be assumed that the words and phrases are used in their technical meaning, if they have acquired one. (Endlich upon Interpretation of Statutes, sec. 2.)

This "elementary rule of construction" has been frequently referred to in judicial decisions.

> In the enactment of laws, when terms of art or peculiar phrases are made use of, it must be supposed that the legislature had in view the subject-matter about which such terms or phrases are commonly employed. (*Ex parte Hall*, 1 Pickering, 261.)

The court there had under consideration a statute containing the word *supersede*, and in construing the same assigned to the word its military instead of its general meaning.

> It is text-book law that terms of art in a statute or a deed are to be taken in their technical sense, because they have a definite meaning, which is supposed to have been understood by those who were or ought to have been learned in the law. (*Brockett* v. *O. and P. R. R. Co.*, 14 Pa. State, 243.)
>
> When a word used in a statute has a fixed technical meaning the legislature must be understood as intending to employ it in that sense, unless there be something in the context which indicates an intention to use it in a different sense. (*State* v. *Smith*, 5 Humphrey (Tenn.), 396.)

The construction of the word *merchant* was in question in this case, and it was held not to include every person who buys and sells, but only those who traffic in the way of commerce or trade and make it their living to buy and sell, although in the broadest sense the word means one who buys or trades in anything.

This rule has found especial application by this court in the interpretation of statutes relating to the revenue laws.

In *American Net and Twine Company* v. *Worthington*, 141 U. S., on page 471, the court said:

> It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification without regard to their scientific designation, the material of which they may be made or the use to which they may be applied.

Citing *Two Hundred Chests of Tea* (9 Wheat., 430, 438), and a number of subsequent decisions of this court.

Applying this rule the court held, page 474, that the goods in dispute should be classed as seines and not thread; that under the circumstances the article was to be classified by its specific designation rather than under a general description.

The same general rule has also been announced in *Maddock* v. *Magone* (152 U. S., 368), and in *De Jonge* v. *Magone* (159 U. S., 569).

THE WORD "EXPORTATION" HAS A WELL-KNOWN RESTRICTED TECHNICAL MEANING.

Whilst the word "exportation" has undeniably a general meaning of simply carrying out of a country or port, it is equally plain that it has also a limited and special or technical meaning, in which sense the word is most commonly used; that is to say, in relation to

trade with other countries—in other words, to foreign commerce. This is more especially true of the word as employed in the drawback section, where the term is used as the direct converse of "importation;" and as to the latter word there can be no dispute that it implies the bringing into this country of goods from a foreign country. Thus the statute has application to the case of goods manufactured in whole or in part of materials *imported* from foreign countries and afterwards *exported*. This exportation, it would seem as a natural sequence, implies the sending back of the goods to foreign countries. As said in the case of Campbell, 107 U. S., 413:

> The purpose of the drawback provision is to make duty-free imports which are manufactured here and then returned whence they came—or to some other foreign country—articles which are not sold or consumed in the United States.

DEFINITION IN LAW DICTIONARIES.

The definition of the words "export" and "exportation" given in law dictionaries bears out the foregoing statement.

ANDERSON.

Export: To carry away or send out of the country.

Exports: Merchandise sent from one country to another.

BLACK.

Export: To send, take, or carry an article of trade or commerce out of the country. To transfer merchandise from one country to another in the course of trade; to carry out or convey goods by sea.

BOUVIER.

Exportation: In common law, the act of sending goods and merchandise from one country to another.

ENGLISH (1899).

Exportation: Shipping of native commodities out of one country into another.

JACOBS–TOMLINS.

Exportation: The shipping or carrying out of the native commodities of England for other countries.

RAPALJE AND LAWRENCE.

Exportation: The act of sending or carrying goods and merchandise from one country to another.

WHARTON.

Exportation: That part of foreign commerce which consists in sending out goods for sale to foreign countries.

Exports: The goods or produce which are sent abroad.

So, also, the following general dictionaries:

CENTURY.

Export: To take or carry away. "They export honor from a man." Specifically, to send to a distant point, as commodities sent for sale or exchange to other countries or places.

Exporter: Specifically, one who ships goods, wares, or merchandise of any kind to a foreign country or distant place for sale.

STANDARD.

Exportation (*commercial*): That act or practice of exporting or of sending out commodities from one country to another for traffic or sale.

Export: That which is exported; in general, goods or any article of trade or merchandise sent from one country to another; properly, and as used in the United States Constitution, goods sent to a foreign country.

WEBSTER.

Export: To carry out or send abroad, or out of a country, especially to foreign countries, as merchandise or commodities in the way of commerce; the opposite of import.

JUDICIAL DEFINITION.

The words "imports," "exports," and "exportation" have frequently received judicial definition, and in every case in which the words were employed in their commercial sense they have been held to apply to foreign commerce, to goods shipped from one country to another in foreign trade, and in no such instance were the words given their general meaning.

This court was first called upon to define the word "imports," as used in the Constitution, in the case of *Brown* v. *Maryland* (12 Wheat., 419). The court had under consideration the provision of the Constitution that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," the specific question being whether the

legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State before he shall be permitted to sell a bale or package so imported. Chief Justice Marshall, in delivering the opinion of the court, said (p. 427):

> What, then, are "imports?" The lexicons inform us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country.

And further on (p. 442):

> It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

And again (p. 445):

> In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As to export, it is said, means only to carry goods out of the country; so to import, means only to bring them into it. But suppose we extend this comparison to the two prohibitions.

> The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. * * * Now, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries, would it be received as an excuse for this outrage were the Government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country.

The logic of the case in its application to the definition of the word "export" is clearly that as importation does not cease until the imported article has been incorporated with the mass of property in the country, so exportation does not cease until the exported article has reached its foreign destination.

The constitutional meaning given to the words "imports" and "exports" in *Brown* v. *Maryland*, and the fact of their necessary correlation, have been adopted and reiterated by this court in frequent decisions since then. In *Woodruff* v. *Parham* (8 Wall., 123, 131), the court said:

> The words "imports and exports" are frequently used in the Constitution. They have a necessary correlation. * * * In the case of *Brown* v. *Maryland* the word "import," as used in the clause now under consideration, is defined,

both on the authority of lexicons and of usage, to be articles brought into the country.

And on page 136:

It is not too much to say that, so far as our research has extended, neither the word "export," "import," or "impost" is to be found in the discussions on this subject as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant.

It was decided by this court in the case of *Woodruff* v. *Parham* (8 Wall., 123), that the term "imports" as used in that clause of the Constitution which declares that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, does not refer to articles carried from one State into another, but only to articles imported from foreign countries. * * * This court, however, after an elaborate examination of the question, held—*Brown* v. *Maryland* (12 Wheaton, 419)—that the terms "imports" and "exports" in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one State to another. (*Brown* v. *Houston*, 114 U. S., 628–629.)

In *Woodruff* v. *Parham* (8 Wall., 123) it was held that the words "imports" and "exports," as used in the Constitution, were used to define the shipment of articles between this and a foreign country and not that between the States. (*Fairbank* v. *United States*, 181 U. S., 294.)

In the recent "Insular Cases" the court uses the following language:

> While the words "import" and "export" are sometimes used to denote goods passing from one State to another, the word "import," in connection with the provision of the Constitution that "no State shall levy any imposts or duties on imports or exports," was held in *Woodruff* v. *Parham* (8 Wall., 123) to apply only to articles imported from foreign countries into the United States. * * * .
>
> It follows, and is the logical sequence of the case of *Woodruff* v. *Parham*, that the word "export" should be given a correlative meaning, and applied only to goods exported to a foreign country. (*Dooley* v. *United States*, 183 U. S., 153–154.)

And in *De Lima* v. *Bidwell* (182 U. S., 176):

> The question involved in this case is not whether the sugars were importable articles under the tariff laws, but whether, coming as they did from a port alleged to be domestic, they were imported from a foreign country—in other words, whether they were *imported* at all as that word is defined in *Woodruff* v. *Parham* (8 Wall., 123, 132).

The decisions of other Federal courts are equally definite and uniform upon this question.

The term "export" was defined by the circuit court for the northern district of New York, in the case of *Kidd* v. *Flagler* (54 F. R., p. 367), as follows:

> The dictionary meaning of the term "export" is as follows: "To carry from a state or country,

as wares in commerce."—Webster's Dictionary. "To send goods or merchandise from one country to another."—1 Bouv. Law Dict., 502; 1 Rap. and L. Law Dict., 487. The term is the direct converse of "import," which means "to bring into a country merchandise from abroad."

An importation means "a bringing into some port, harbor, or haven with an intent to land the goods there." (*The Mary*, 1 Gall., 206.) Importation takes place when the vessel arrives at a port of entry intending there to discharge her cargo. (*United States* v. *Vowell*, 5 Cranch, 368; *McLean* v. *Hager*, 31 Fed. Rep., 602; *United States* v. *10,000 Cigars*, 2 Curt., 436; *Arnold* v. *United States*, 9 Cranch, 104; *Meredith* v. *United States*, 13 Pet., 486; *Clarke* v. *Clarke*, 3 Woods, 408; *Barrett* v. *Railroad Co.*, 2 Man. and G., 155; *Two Thousand Tin Cans*, 7 Ben., 34.)

The same case was heard on appeal in the circuit court of appeals for the second circuit, reported in 78 F. R., page 341. The appellate court reversed the judgment, but approved the general definition of the word "export" given by the court below in the following language:

> Ordinarily, goods are exported when they are carried out of the country for the purpose of being transferred to a foreign situs. Goods en route from one place to another in the United States are not exported merely because while in transit in cars or vessels they may be temporarily outside the boundaries or within the boundaries of a foreign country. Conversely,

> goods are imported when they are brought within the country with intent to land them here. The *intent* characterizes the act and *determines its legal complexion.* (*United States* v. *Vowell*, 5 Cranch, 368 *The Mary*, 1 Gall., 206, Fed. Cas. No. 9183; *The Boston*, 1 Gall., 239, Fed. Cas. No. 1670.) In the absence of language in the statute indicating a contrary intention, it would be assumed that in section 3330 Congress used the term "exportation" in the sense thus attributed to it.

In *United States* v. *Forrester* (25 Fed. Cases, p. 1152) is found a discussion of the word "import:"

> The term used is "import," and legislation employed that term in its commercial sense, which is to bring from a foreign jurisdiction into this jurisdiction merchandise not the product of the country. Its commercial meaning is directly contrary to the term "export." Both phrases have a technical meaning in the law. We "import" teas from China, wines from France. We "export" cotton, tobacco, pork, and wheat.

INTENT TO RELAND IN A FOREIGN PORT OF THE ESSENCE OF IMPORTATION OR EXPORTATION.

It is clearly deducible from the foregoing decisions that the essential element of an importation or an exportation, in its constitutional sense, is the intent to reland the goods in some foreign port; indeed, this principle has been expressly announced by the courts.

> To constitute an importation there must be a voluntary arrival within the limits of the port of entry with the intent to unlade the goods there. (*The Mary*, 1 Gall., 206.)

> An importation is complete when the goods are brought within the limits of the port of entry with the intention of unladening them. (*United States* v. *10,000 cigars*, 2 Curtis, Cir. Ct. R., 437.)

In *McLain* v. *Hager* (31 F. R., 604) the court says of opium shipped on board a steamship from Honolulu to Panama by way of San Francisco, intended to be transferred without landing to another steamer at San Francisco running to Panama, and which was so transferred at San Francisco: "It was not imported into the United States in any proper sense of the term."

Foreman v. *Peaslee*, Monthly Law Rep., vol. 21, p. 273.

This was a case in which railroad iron exported from England to this country was shipped from Wales to Liverpool on coasting vessels, and at Liverpool laden on packet ships en route to Boston. In appraising the iron the appraisers at Boston fixed its market value at the time of its departure from Liverpool, against the protest of the importer that the value of the iron at Wales should govern, and thus the question was raised in the case as to when the exportation began. In considering this question, Curtis, J., delivering the opinion of the circuit court, said (p. 274):

> The natural meaning of the words "period of exportation" is termination of exportation. The period of exportation is that point of time when the act of exportation is complete. The subject-matter of the statute is the appraisal of goods exported from a foreign country and im-

ported into the United States. So that the inquiry in this case is, At what point of time was the act of exportation of this merchandise from the foreign country, England, complete? My opinion is, when it left Liverpool. Its transportation coastwise from one English port to another was not an exportation from England. Until the vessels of Train & Co having it on board were cleared and sailed from Liverpool, there was no completed act of exportation. Until that time the property was under the control of the British Government, whose order could have arrested and detained it within that country, and whose control over it would have been unaffected by the fact that it had been brought from Cardiff and Newport for the purpose of being sent to the United States.

The plaintiff's counsel relied on the case of *Barrett* v. *The Stockton and Darlington Railway Co.*, reported in 2 Man. & Gr., 134, and on error in 3 M. and G., 956, and 11 Cl. and Fin., 590. But that case tends to support the construction which I place on the act of Congress. It is true it was decided in all the courts that under the act of parliament then in question, exportation might mean simply carrying out of a port; and as between the public and a corporation claiming a toll, and upon the special provisions of that act, it was held it did mean so, but it was admitted that its more usual sense was a more restricted sense, and covered only cases where property was not merely sent out of one port to another of the same kingdom, but carried to a foreign country.

> And that such is the meaning of the word exportation in this act of Congress can admit of no doubt, for it can have no reference to transportation from one port to another of the same country; its language and its object and its subject-matter all confine the exportation here spoken of to an exportation from some foreign country to the United States.

So controlling a fact, indeed, is the intent to reland that it has been held that logs which were the property and in possession of persons engaged exclusively in exporting timber from the United States to foreign countries (which had been purchased from citizens of Georgia for the purpose of exportation, were in the port of Georgia and of the United States awaiting shipment, and not on shipboard, which had been inspected according to the laws of Georgia and were afterwards exported by the owners) were, while awaiting shipment and still on land, exports within the meaning of section 1, article 10, of the Constitution of the United States. (*Clark & Co.* v. *Clark et al.*, 3 Wood's Reports, 408.)

EXCEPTIONAL CASES.

Counsel for claimant have called attention to two English cases in which the word "exportation" was given its broad, general meaning, instead of the more restricted meaning in which the word is employed when used in its commercial sense. In neither of these cases did the statute under consideration have relation to customs duties, nor to the ordinary commercial use of the term "exportation," but in each instance the

statute was a special one, and the circumstances were such as to make the case exceptional; so that the cases, so far from being out of harmony with the rule of construction which is here contended for, are, in reality, exceptions of a nature which go to prove the rule rather than to contradict it. The first of these cases is *Barrett* v. *Stockton R. R. Co.* (Court of Common Pleas, 2 M. & G., 134.)

In this case the defendant railroad company was, by act of Parliament, limited to a much lower rate for freight upon coal carried on its road to the port of Stockton-on-Tees and shipped from that port for exportation than upon coal carried by it and not so shipped, and the question in the case was whether this act was to be construed as applying only to coal shipped for some port outside of Great Britain. It was conceded on all hands that the term "export" had a technical meaning as used in relation to customs duties, and the only question was whether this technical meaning or its broad, general meaning should be applied in the particular case. It was held by the court that the word as used in the particular act under consideration was not restricted to foreign commerce, but included also the carrying of commodities from one port to another within the kingdom (p. 163), and, further, that if the word was to be taken as ambiguous in its meaning, it should be held to include exportation to domestic ports on the general principle laid

down by Lord Ellenborough in *Gildart* v. *Gladstone* (1 East., 675):

> If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public and against that of the company, because the company in bargaining with the public ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it is clear that it was so intended.

The judgment of the court in this case was affirmed on appeal to the House of Lords. (11 Clark and Finnelly, 590.)

In discussing the case on this appeal, the Lord Chancellor said (p. 601):

> The first question relates to the meaning of the terms "shipped for exportation," in the *Stockton* and *Darlington* railway act; whether they were confined to exportation to foreign countries, or included shipments of coals to be carried coastwise to other parts of the kingdom. There is not, I think, any reason for adopting the narrower interpretation. The terms are large enough to comprehend both; and if it was a case of doubt, the rule is, in acts of this nature, to adopt the construction most beneficial to the public. I may further observe that, from the nature of the article, the home market would probably have been at least as much in the contemplation of the legislature as the foreign.

And the court adopted this view of the case (p. 605).

The reporters of the case in Manning and Granger append the following very significant note on page 155:

> The meaning of the term "exportation" will, it is conceived, depend upon the *termini* expressed or implied. Thus, when the legislature of the United Kingdom speaks of exportation, without saying from what place, the entire kingdom which is the subject of legislation will be the *terminus a quo* and some foreign country or countries the *terminus in quem*

But in this particular instance the act related not to exportation generally, but exportation from the particular port of Stockton-upon-Tees, and was not a customs duty for the benefit of the general public by way of increasing the revenues of the realm, but a toll for the benefit purely of the railroad company.

And see review of the case in *Foreman* v. *Peaslee* (*supra*).

The other case is *Muller* v. *Baldwin* (9th L. R., Q. B., 457).

This action related to certain coal dues which commissioners were appointed to demand as "River Tyne export dues," to be carried to the account of the Tyne Improvement Fund. The action was brought to recover certain of these dues collected by the authorized collector of dues for the Tyne Improvement Commission upon coals taken on shipboard at the port of Newcastle and carried out of port to be consumed during the voyage. The county court held that the term "exported" must receive a qualified interpretation and be taken to mean coals exported for the purpose of

commerce only. The appellate court agreed to the reasonableness of this distinction, but felt constrained to differ with the learned judge as to the construction of the act, holding that there was nothing in the language of the act to show that the word "exported" was used in any other than its ordinary sense, namely, carried out of the port.

It will be observed that the act construed had no reference to customs, but only to special tolls allowed by the act to the Tyne Improvement Company commissioners for the purpose of improvement of the river and harbor, a purpose which most properly demanded a liberal construction of the act.

THE MEANING DEFINITELY ESTABLISHED.

Thus we find established by the harmonious definitions of legal writers and in the uniform decisions of this court and of all other courts of the United States before which the question has been brought, that the word "exportation" has a technical commercial meaning, which is limited to the carrying out of the country of goods with intent to land the same in some foreign country, this intent being an essential and controlling fact in the case; and that when employed in its commercial sense, the word has never been construed to include a mere carrying out of port to another port in the same country, or upon the high seas. Such, at any rate, is the meaning of the word as employed in the Constitution, and it follows that the same meaning must be attached to it in the statutes of the United States, over which the Constitution is paramount.

The Constitution and the statute will be construed together as one law. (*Kentucky R. R. Tax Cases*, 115 U. S., 334.)

HISTORY OF DRAWBACK LEGISLATION.

An examination of the various statutes of the United States relating to the subject of drawback shows clearly that the constitutional meaning of an exportation in the usual commercial sense to foreign countries is contemplated in the same.

Section 3015 of the Revised Statutes, enacted March 2, 1799, provides as follows:

> A drawback of duties, as prescribed by law, shall be paid on all merchandise imported into the United States, in respect to all such merchandise as shall be exported *to any foreign port* other than the dominions of any foreign state immediately adjoining to the United States, either from the district of original importation or from certain other districts; and all duties, drawbacks, and allowances which shall be payable or allowable on any specific quantity of merchandise shall be deemed to apply in proportion to any greater or less quantity except as herein otherwise provided.

It will be perceived that this section clearly prescribed that the merchandise should be exported to a foreign port. The restriction as to contiguous territory was subsequently removed by sections 2977, 3053, and 3056, Revised Statutes.

On August 5, 1861, section 3019, Revised Statutes, was enacted in order to permit the refund of duties

paid, by way of drawback, on the exportation of articles manufactured wholly from imported materials. This section was merely an enlargement of section 3015, Revised Statutes, and was therefore to be construed in the light of that provision of the statutes. Section 25 of the act of October 1, 1890, section 22 of the act of August 28, 1894, and section 30 of the act of July 24, 1897, which are identical in terms, still further enlarge the provisions of section 3015, Revised Statutes, by permitting the allowance of drawback on the exportation of articles manufactured wholly or in part of imported materials. These subsequent provisions of law are to be construed in connection with section 3015 and sections 3043 to 3047, Revised Statutes, the latter sections relating to the production of landing certificates and the cancellation of bonds given therefor.

Section 3057, Revised Statutes, provides:

> The Secretary of the Treasury is hereby further authorized to prescribe such rules and regulations, not inconsistent with the laws of the United States, as he may deem necessary to carry into effect the provisions of the law relating to drawbacks, and to prevent the illegal reimportation of any merchandise which shall have been exported as herein provided.

Under this provision and the authority vested in the Secretary of the Treasury by section 30 of the act of July 24, 1897, drawback regulations were prescribed. (Circular No. 3 of January 14, 1901, T. D. 22721.)

Articles 1120 and 1141 of the Customs Regulations of 1899 prescribe that a party intending to export with the benefit of drawback any merchandise on which duty has been paid must file with the collector an entry * * * naming the vessel or conveyance in which and the *place to which* the same is to be exported.

Articles 1127 to 1129 and 1147 provide for a bond for the production of *proofs of landing abroad.*

By virtue of section 3057, Revised Statutes, and the well-settled doctrine regarding the force and effect of regulations of the Executive Departments, and having in view the respect which is paid by the courts to long-continued contemporaneous departmental construction of a statute, the foregoing requirements as to proofs of landing constitute an interpretation of the statute entitled to great weight in this case. It is urged, to be sure, by counsel for claimants that, whilst the first drawback statute used the phrase "exported to any foreign port," the statute of 1861 omitted the words "to any foreign port," and that this change must be taken to indicate an enlargement of the term "exported;" but the answer to this contention is obvious. At the time that the first drawback statute was enacted, in 1799, it was not at all certain that the word "exports," as used in the Constitution, did not include commerce between the States, and hence it was necessary in the earlier statute to restrict, in express terms, the application of the drawback statute to exportation to foreign countries, since interstate commerce

was not intended. Long before 1861, however, it had been decided in *Brown* v. *Maryland* that the word as used in the Constitution had reference to foreign commerce only, hence the words "to any foreign port" became superfluous.

WHEN EXPORTATION TERMINATES.

As already said, the logic of the reasoning of Chief Justice Marshall in *Brown* v. *Maryland* is this: If imports do not lose their character as such until they become mingled with the mass of commodities in the community, then exports do not cease to be such because the vessel upon which they are laden has left the port of export and is crossing the sea, but continue to be exports until, by arriving at the port of destination, they assume the character of imports.

Counsel for claimants seem to argue that because it has been held that the act of exportation is complete when the exported goods are laden on shipboard and the vessel has left port, therefore exportation, within the meaning of the drawback act, has been fully evidenced by proof of these facts only. But this argument slurs over one vital fact in the decisions quoted and wholly mistakes the force of the decisions themselves. In every case in which the act of exportation has been thus defined as complete, the *intent to land the goods in a foreign country* has first been shown. It follows, therefore, that although the act of exportation may be complete when goods *intended for foreign ports* are laden on a ship and the ship has left her port; nevertheless, the exportation is

not then *at an end* but *continues* until the ship has reached its port of destination with the intent to land the goods there. Then the export becomes an import; then, too, the act of importation is complete. And yet, as decided in *Brown* v. *Maryland*, the importation is *not at an end* until the goods have been not only landed and taken past the customs officers, but have been taken out of the original packages and mingled with domestic goods.

THE PRECISE QUESTION INVOLVED IN THE CASE.

Although counsel for claimant have been to considerable pains to show that there are two meanings of the word "exportation," its general meaning and a specific meaning, their industry in establishing this undisputed distinction seems to be but lost labor, for eventually they practically plant their case upon the specific meaning, by insisting that, properly construed, that meaning embraces their claim. And hence the question is narrowed down to this:

Did Congress, in enacting the drawback provision of the tariff act of 1894, use the word "exportation" with the meaning that is attached to it by the courts and by law writers generally, where the word is employed in its commercial sense, or did they intend it to comprehend every case in which goods are carried out of this country on board ships engaged in foreign trade, irrespective of any intent to land the same in some foreign port; or, more specifically, to ships' stores of such vessels?

The answer seems inevitable that the word was employed only in the sense in which it is universally understood when used in relation to commerce, and that it is not to be supposed that Congress could, by any possibility, have had in mind any such exceptional condition as appears in this case, so as to have intended that the words should have the application thus contended for. That is to say, it is unreasonable to suppose that Congress contemplated any other meaning of the word, as used in the drawback statute, than that uniformly given to it in that connection by every known legal authority.

The contention of the claimants takes the form of assertion that a ship engaged in the foreign trade is foreign territory—a foreign market. If this contention were confined to foreign ships there might be some color of reason for it, but no such limitation is made to the claim, and hence we have presented the curious proposition that an American ship, flying the American flag, whose deck is as sacred from foreign invasion as the home port from which she sails, is *foreign territory*. It seems to be unnecessary to add to this extraordinary statement anything by way of refutation. But, it is urged, the ship engaged in foreign trade is open, competitive territory, free to buy her ships' stores where she will, and *therefore* she is foreign territory. To begin with, this is not always the situation. The American ship that is entering upon her first foreign voyage certainly does not come within this category. Neither is it at all probable that *any* ship

in the foreign trade will at all times be in a perfectly independent position in the matter of purchasing her supplies. To a certain extent she would undoubtedly be obliged to replenish some portion of her stores at the beginning of each voyage. All these matters suggest such a wide difference in the circumstances surrounding the shipment of goods to foreign countries, and the sale of them as ships' stores to vessels in port, as to virtually do away with even an analogy between the two cases. There seems to be absolutely no warrant for the contention that a ship in the foreign trade is foreign territory. It involves the absurdity of depriving such ship of all national character and making it foreign territory to the whole world, including its own country. An accurate statement of the situation is that ships' stores are consumed in no particular country, but upon the high seas, which are no man's territory, but the common property of all. This question has been directly passed upon, and squarely against the contention of claimant, by Acting Attorney-General Richards, in an able opinion addressed to the Secretary of the Treasury (23 Opp. A. G., pp. 420, 421). The opinion cites the opinion of Attorney-General Brewster upon the same general question in 17 Opp. A. G., pp. 582 and 583, in which the following language is employed:

> There may be instances in the statutes where the word "export" is shown directly or by the context to have been used irregularly—as, for instance, in section 1955, where the exportation to Alaska from any port of the United States is

> spoken of—but these are exceptional, the effect being, of course, limited to what is in the same connection expressly provided, and therefore without influence but upon what ordinarily is the statutory use of the word. * * *
>
> As the legal notion of emigration is a going abroad with an intention of not returning, so that of exportation is a severance of goods from a mass of things belonging to this country, with an intention of uniting them with a mass of things belonging to some foreign country or other.

The drawback act has also quite recently been construed in *Kennedy* v. *The United States*, circuit court of appeals for the second circuit, 95 F. R., 129.

In this case it was contended by the claimant that jute bags leased to a steamship company for transportation of grain are exported, within the meaning of the drawback provisions of the customs administration act. The court held that—

> The exportation to which the statute refers is an exportation to a foreign country for use in such country or for sale. * * * The provisions all imply that the bags are to be or have been subjected to a foreign, as distinguished from a domestic, use. The bags in this case were leased to a steamship company to be used for transportation of grain and to be returned, and were employed on the ship as a part of its appliances for the transportation of freight, and, like the barrows and trucks on board the ship, which are the property for the time of the shipowners, were neither exported

> nor imported within the meaning of the tariff laws, but were a part of the furniture or equipment of the ship.

These words seem to apply very aptly to the facts in this case.

Claimant's counsel will have it that the position of the Government is, that there can be no exportation without a relanding of goods in a foreign port. This is an entire misapprehension. As already stated, and as appears beyond peradventure, it is the *intent to reland* in a foreign country that constitutes the essential element of an exportation and makes the act of exportation complete when the goods leave port on shipboard, thus destined. The proof of relanding which is demanded by the regulations of the Treasury Department is simply evidence that this intent is *bona fide* and has been carried out. The instances cited by counsel in which this proof of relanding has been excused are cases of such excusable casualty as seem to justify the leniency of the Treasury Department thus displayed, and nothing more can be gathered therefrom, for in every case the intent to reland in a foreign country had appeared beyond question.

THE INTENT OF THE STATUTE.

Much stress is placed by counsel for the claimant upon the supposed purpose of the drawback law, the contention being that this claim is wholly within that purpose. Of course, if the meaning of the words of the statute here in question is clear and unambiguous, that meaning must control and render any inquiry into

the intent of the statute unwarranted and unnecessary. However, the contention of the Government in this case has nothing to fear from such inquiry. That intent seems to be sufficiently set forth in the following quotation from the Campbell case, already cited in this brief:

> The purpose of the drawback provision is to make duty free imports which are manufactured here and then returned whence they came or to some other foreign country—articles which are not sold or consumed in the United States.

In the foregoing statement Justice Miller clearly had in mind the generally received interpretation of the term "exportation," to wit, the sending of goods in international commerce to some foreign country. And the force of the statement is not, as counsel for claimant would have it, at all weakened by the concluding phrase "articles which are not sold or consumed in the United States;" for this phrase is not employed as an equivalent of, nor in apposition to the preceding phrase, but as its complement.

In the case of the *Tidewater Oil Company* v. *The United States* (171 U. S.), the court says, on page 216:

> The object of the section was evidently not only to build up an export trade but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in *foreign markets* with the same articles manufactured in other countries.

It is perfectly apparent from these decisions that this court has construed the purpose of the drawback provision to be not only the encouragement of manufactures in this country, but the enlargement of our trade with foreign countries. No other meaning can be drawn from the language employed. There is nothing to indicate that the words "foreign markets" were employed in any other sense than their universally accepted meaning of markets in foreign countries. It is clear, too, that the benefits to be secured from foreign trade can only be fully realized by the sale of goods to foreign countries and would fail in many instances in the case of the sale of ships' stores in port.

But if, indeed, there can be any ambiguity found in the statute, the doubt should be solved in favor of the Government, since the claimant is claiming the benefit of a special privilege—exemption from the burden of a general statute.

> If there be any doubt as to the proper construction of a statute, then that construction must be adopted which is most advantageous to the interests of the Government. The statute being the grant of a privilege, must be construed most strongly in favor of the grantor. (*Hannibal, &c., R. R. Co.* v. *Packet Co.*, 125 U. S., 271.)

It is suggested by counsel for claimant that an unreasonable result might arise through the exportation of the oil in question to a foreign port, thus obtaining the drawback, and the purchase of the same at the foreign port for use as ships' stores by the very steamer that carried it. But the oil thus imported into a

foreign country would become thereby a foreign commodity, and its further use must be a matter of indifference to this country, unless it is sought to reexport it hither. But it is to be noted in this connection that if the oil were purchased by a steamer in a foreign port for use on its return voyage, the unused portion of the oil on board when the vessel arrived in an American port would not be an import, because not brought into port with intent to land the same.

JUDICIAL ENLARGEMENT OF THE STATUTE ASKED FOR.

The claim amounts to a request for judicial legislation. At best the claimant has shown that the sale of ships' stores to a vessel in the foreign trade, coupled with their consumption on the ship's voyages, is *analogous* to an exportation, and that such trade fulfills to some, and perhaps to a considerable extent the purposes of the drawback act. But this is not sufficient to justify the allowance of the claim, because these facts do not constitute an exportation, and it is by proof of exportation only that the right of drawback arises under the statute. The allowance, then, of this claim by the courts would be pure judicial legislation, which this court has never countenanced.

> No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. (*United States* v. *Goldenberg*, 168 U. S., p. 103.)

LOUIS A. PRADT,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 256.—October Term, 1902.

The Western Union Telegraph Company, Plaintiff in Error, vs. The State of Missouri at the Relation and the Use of Chris. Gottlieb, Collector of the Revenue for Jackson County, Missouri.	In error to the Supreme Court of the State of Missouri.

[May 18, 1903.]

The defendant in error is the tax collector of Jackson County, Mo., and brough this action against the plaintiff in error in the Circuit Court of that county for the sum of $1,027.22, the taxes assessed against plaintiff in error for the year 1899, apportioned to Jackson County. The answer of the plaintiff in error alleged illegality in the taxes upon ~~three~~ two grounds: First, that the taxes were levied upon the franchise of the plaintiff in error, derived from the United States under certain acts of the Congress; second, that the State board of equalization, intending to injure the plaintiff by compelling it to pay an excessive and disproportionate share of State and local taxes, assessed its poles, wires and instruments at far more than their actual value.

The plaintiff in error is a telegraph company, incorporated by the State of New York. It does business in the State of Missouri, having offices in a number of cities of that State, and its lines run between those cities and to and from them to other places in the Union; in other words, the plaintiff in error engages in intrastate and interstate business. It claims to have no franchises from the State of Missouri, (except in an unimportant instance,) but occupies the streets of its cities, and its public roads and highways, by authority of the act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes." The material part of section one of the act is as follows:

"Section 1. That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by an act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters and interfere with the ordinary travel of such military or post roads."

Section two provides that the messages between the officers and agents of the Government shall have priority, and be sent at rates to be fixed by the Postmaster General.

Section three forbids the transfer of the rights conferred by the act.

Section four gives the United States the power to purchase the telegraph lines, property and effects of any company availing itself of the benefits of the act.

Section four is as follows:

"*And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this act."

Under the constitution and laws of Missouri, the State board of equalization, composed of the governor, secretary of State, State auditor, State treasurer and attorney general, assesses railroad and telegraph property, and it also equalizes the real and personal property assessed by the local assessors. Exercising its powers of original assessment, the board made the following order in regard to the property of plaintiff in error:

"State of Missouri, office of State auditor.

"Be it remembered that heretofore, to wit, on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the State board of equalization, viz:

"The State board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company, through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidence of value, and all matters bearing upon the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and the gross receipts and net earning power, and the franchise and value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the State board of equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the State board of equalization that the assessed value thereof be distributed upon the classes of property as follows:

6,075.98 miles of poles at $71.50 per mile	$434,432 57
23,767.34 miles of wire at $22.02 per mile	523,356 82
3,375 instruments at $5.70 each	13,537 50
All other property at	856,400 56
	$1,827,727 45"

The apportionment of the tax to Jackson County was as follows:

For State purposes	$202 43
For county purposes	283 40
For road purposes	35 41
For general county school purposes	370 61
For school building purposes	2 98
For other school purposes	19 03
For Kansas City municipal purposes	81 21
For Independence municipal purposes	25 38
For Kaw township railroad purposes	2 03
For Blue township railroad purposes	4 74
Total	$1,027 22

The case was tried without a jury and the trial court found "the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of said assessment, the poles, wires and instruments of the value hereinbefore set forth. And the court finds the fact to be from the evidence that in valuing 'all other property' of defendant the State board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation, and as to this item of the above-named valuation the court finds the issues for the defendant."

Judgment was entered against plaintiff in error in the sum of $605.82, being the tax on the poles, wires and instruments of the company, with interest at two per cent for collectors' fees, and also for an attorney's fees. The amount found due was made a first lien against the property of defendant in error, and special execution ordered to be issued. Both parties moved for a new trial, which motions were denied. Both parties then appealed to the Supreme Court of the State, which court reversed the judgment of the Circuit Court. After an elaborate discussion of the case the Supreme Court said:

"It follows that the judgment of the Circuit Court holding that the tax assessed against 'all other property at $856,400.56' to be unlawful, is erroneous, and that the plaintiff is entitled to a judgment for the whole amount of the tax sued for. Judgment is accordingly entered for the plaintiff here for $1,027.22, back taxes for the year 1899, with interest thereon from the first of January, 1900, at the rate of one per cent per month (R. S. 1899, sec. 9225), and costs."

This writ of error was then sued out. Other facts appear in the opinion.

Mr. Justice McKenna, after stating the facts, delivered the opinion of the Court.

On the question of fact, if it be such, as to what the item "of other property at $856,400.56," in the assessment by the board of equalization, was constituted of the trial court and the Supreme Court of the State, are not

in accord. The trial court found the "fact to be from the evidence that in valuation 'of other property' of defendant, the State board took into consideration the franchise of defendant company." It is apparent from the court's opinion that by franchise the court meant the rights and privileges obtained by the plaintiff in error under the act of Congress of July 24, 1866. The Supreme Court of the State, however, expressed its conclusion from the evidence, as follows:

"So, that, when, in determining the value of the property of the defendant in this State, the board of equalization took into consideration 'the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof,' it did not and could not have included therein any franchise derived by the defendant from the Government of the United States, because that Government had conferred no such franchise; nor was such a valuation placed upon 'all other property,' a tax upon the franchise of the defendant company. The franchise derived by the defendant from the State of New York was considered by the board in determining the value of the property of the defendant located in this State. That is, that property was valued not as so many poles, so much wire, so many instruments or so much 'other property,' in the abstract, but was valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which being brought into relation toward each other—into a *system*, located partly in this State and partly in other States, gave each part a concrete value, which was much greater than its abstract value. The right to exist—the franchise—of the defendant was property, and was subject to taxation, either directly, in the proportion that the portion of the franchise exercised in this State bore to the proportion of the franchise exercised in all other States, or indirectly, as was done in Massachusetts and was done here, by being impressed upon the tangible property owned by it, thereby increasing its value, and by considering the franchise and its tangible property as a system, and then assessing the part of the property forming a part of the system and located in Missouri as of its proportionate value of the whole property constituting the system."

Plaintiff in error asserts the correctness of the finding of the trial court, and insists that it is the only finding that could have been made, and bases the argument against the taxes assessed on that insistence. But if the finding on the question is one of fact, necessarily we are bound by that made by the Supreme Court of the State. The trial court picked out the rights given to the defendant under the act of Congress, denominated them a franchise, contemplated the franchise as a distinct proprietary entity, and, because it was derived from the Federal goverment, decided that it was exempt from taxation. The necessary consequence was and is to destroy the relation between that franchise and the other properties of the plaintiff in error, regarding them, not as parts of the system, but abstractly—regarding the poles not differently from other poles, the wire

not different from other wire. The Supreme Court, on the contrary, regarded the properties as related and as constituting a system, and because of their relation having a value greater than the sum of the values of the individual things regarded merely as such. Viewing the order of the board of equalization, as the Supreme Court viewed it, was it valid? In other words, is the State in exercising its taxing power limited to assessing the mere material things used by the plaintiff in error, and must it regard them as of no greater value than they had when they reposed in lumber yards and factories, with cost added of putting them in place. Or the proposition may be stated another way, which better expresses the ultimate contention of the plaintiff in error. Conceding that the tangible property of the telegraph company derives value from its use in a system, does the company do business in the State in pursuance of the Constitution of the United States and the act of July, 1866, and become thereby an instrument of interstate commerce and a government agent, and as such exempt from the taxation contested in this case? We think the question has been answered by this court.

In *Western Union Telegraph Co.* v. *Massachusetts*, (125 U. S. 530,) the effect of the act of July, 1886, upon the power of the State to tax the property of telegraph companies was considered. The laws of Massachusetts imposed a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which was ascertained by comparing the length of its lines within the State with the length of its entire lines. The tax was sustained. The act of July, 1866, was urged against the tax as it is urged here.

The contentions of the company in that case was, as it is in this, that it did not derive its existence from the State of Missouri, but from the State of New York; that it did not do business in the State of Missouri by permission of that State, but by virtue of being an instrument of interstate commerce; that its rights and privileges and franchises were conferred by the United States and constituted it an agent of the United States, and as such agent it was exempt from the tax imposed. The contentions were rejected. The court did not test or measure the power of the State by the name which its laws gave the tax, and, speaking by Mr. Justice Miller, said:

"The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited, cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein."